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In the Supreme Court of the United States

October Term, 1970
No. 1309

VICTOR W. ANCKAITIS, Secretary of Transportation of the Commonwealth of Pennsylvania and FRANK McCORMICK, Supervisor, Financial Responsibility Division, Bureau of Traffic Safety of the Commonwealth of Pennsylvania,

Petitioners

v.

CHARLES F. MILLER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT COURT

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1970
No.

Victor W. Anckaitis, Secretary of Transportation of the Commonwealth of Pennsylvania, and Frank McCormick, Supervisor, Financial Responsibility Division, Bureau of Traffic Safety of the Commonwealth of Pennsylvania,

Petitioners

v.

Charles F. Miller,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT COURT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit filed in the above-entitled case on December 7, 1970.

CITATIONS TO OPINIONS BELOW

The Opinion of the Third Circuit Court of Appeals is reported as *Miller v. Anckaitis,* in —— F. 2d ——, 39 U.S. Law Week 2334, filed December 7, 1970, and is printed in the Appendix hereto, pages 21 to 37.

The Opinion of the District Court is reported as *Miller v. Depuy,* in 307 F. Supp. 166 (1969), and is printed in the Appendix hereto, pages 38 to 52.

The Opinion of the District Court is reported as *Miller v. Smith,* in 236 F. Supp. 927 (1965), and is printed in the Appendix hereto, pages 75 to 96.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), which authorizes review by Writ of Certiorari a decision rendered by the Courts of Appeals.

The decision and opinion of the Third Circuit Court of Appeals was filed and entered on December 7, 1970.

JURISDICTION OF THE FEDERAL COURT IN THE COURT OF FIRST INSTANCE

The jurisdiction of the Federal Court in the Court of First Instance was invoked pursuant to 28 U.S.C. §1334, 2281, 42 U.S.C. 1983 and §§11 and 35 of the Bankruptcy Act, 11 U.S.C. §§29, 35, Article VI, Clause 2 of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Does the Pennsylvania Financial Responsibility Law which conditions the return of a judgment debtor's automobile operator's license and automobile registration on payment of the judgment in question, notwithstanding his discharge in bankruptcy, conflict with §17 of the Bankruptcy Act and therefore violate the Supremacy Clause in Article VI, Clause 2, of the United States Constitution based on respondent's vicarious liability for the negligent driving of his truck by a subagent?

2. Was the respondent discriminated against and deprived of the equal protection of the law under the Fourteenth Amendment?

3. Was the respondent deprived of due process of law under the Fourteenth Amendment?

4. Was the respondent deprived of his civil rights, of his property rights, or of a Federally created privilege secured by the United States Constitution and laws?

PROVISIONS OF THE UNITED STATES CONSTITUTION

The Supremacy Clause

Article VI, Clause 2 of the Constitution

Due Process and Equal Protection Laws

Fourteenth Amendment

PROVISIONS OF THE ACT OF CONGRESS

Section 17 of the Bankruptcy Act

11 U.S.C. §35

"Debts not affected by a discharge, a discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except * * *" (exceptions not applicable here).

STATE STATUTES INVOLVED

The Pennsylvania State Statute, the constitutionality of which is challenged is §1414 of the Pennsylvania Motor Vehicle Safety Responsibility Provisions, Act of April 29, 1959, P. L. 58, 75 Purdon's Statutes, §1414, which provides

> "*Suspension to continue until judgments paid and proof given*
>
> "Such license, registration . . . shall remain so suspended and shall not be renewed nor shall any such license or registration be thereafter issued in the name of such person, . . . unless and until every such judgment is stayed, satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemption stated in sections 1413 and 1416 of this act.
>
> "A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."
>
> (The exemptions stated in Sections 1413 and 1416 of the Act are not applicable to the present case.)

STATEMENT OF THE CASE

On August 30, 1956, one Anderson, as part of his employment by Respondent Miller, drove Miller's truck on a regular daily run from Philadelphia to Grasonville, Maryland, on Chesapeake Bay, to buy and transport back a load of freshly-caught crabs to the Respondent's restaurant, called the Maryland Crab House, in Philadelphia.

The round trip between Philadelphia and Grasonville was between 250 and 275 miles. On this day, Anderson took with him for company his cousin, John Crosby Boyd, age seventeen. As part of his job Anderson had made the trip to Grasonville fifteen (15) or twenty (20) times previously. At a time previous to the accident, Anderson had discussed with Respondent Miller, his employer, the question of whether or not he could take someone with him to Grasonville for company. Respondent Miller made no comment, but he did not forbid it.

At Grasonville, Anderson and Boyd both helped to load the fresh crabs on the truck and to put ice on them. When the truck was ready to start its return journey to Philadelphia, Anderson felt tired or ill and asked Boyd to drive for him. Along the way, they stopped and Anderson picked up a puppy dog. After a short distance, the puppy dog vomited and the truck was halted to enable the dog to run a little. As Boyd continued to drive toward Philadelphia,

his attention was distracted by the restless antics of the puppy which Anderson was trying to keep on his lap. Because the driver was distracted, the truck veered to the left side of the road where it collided with an approaching automobile being operated by Louis Ungolo. Ungolo and his daughter were injured. His wife and son were killed.

A survival and wrongful death action was brought against Boyd, Anderson and Respondent Miller in the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 23013 resulting in judgments in favor of Louis Ungolo and Mary Ann Ungolo, a minor, survivors of Josephine Ungolo and Louis Ungolo, Administrator of the Estate of Josephine Ungolo, Deceased, and in favor of Louis Ungolo and Mary Ann Ungolo, a minor, survivors of Frank Ungolo, Deceased, and Louis Ungolo, Administrator of the Estate of Frank Ungolo, Deceased, and in favor of Louis Ungolo, parent and natural guardian of Mary Ann Ungolo, a minor and in favor of Louis Ungolo. The judgments entered totalled $58,283.92 were returned against Boyd and Respondent Miller in Civil Action No. 23016 on May 21, 1962. On post-trial motions, Senior District Judge Grim held Miller liable for Boyd's actions based upon *Hendler Creamery Co. v. Miller,* 153 Md. 264, 138 A. 1 (1927); and Restatement, Agency 2d, §79. Section 79, Illustration 5, reads:

> "5. P employs A as a truck driver to carry a valuable load of perishable fruit to a distant town. Enroute, A becomes ill and unable to drive. Being unable to communicate with P,

> he employs B, a competent driver, to take his place for a trip. It may be found that A was authorized to employ B as P's servant."

Furthermore, the judgment was reduced in the sum of $500 as the Maryland Death Act permits the husband no recovery for loss of wife's companionship, and so the judgments rendered were to be $57,783.-92. See *State of Maryland to the use of Louis Ungolo et al. v. Charles Miller et al.*, 210 F. Supp. 193 (E.D. Pa. 1962).

The judgment creditors in the above civil action requested the Clerk of the District Court for the Eastern District of Pennsylvania, to send copies of the judgments to the Secretary of Revenue, since these judgments were unsatisfied within sixty (60) days.

In accordance with Section 1413 of The Vehicle Code, Act of 1959, P. L. 58, as amended; 75 Purdon's Statutes 1413, the Secretary of Revenue suspended the right of the Respondent to register or operate an automobile in the Commonwealth of Pennsylvania because of the unpaid judgments.

On June 10, 1963, Respondent was discharged in Bankruptcy from liability to pay the judgments rendered against him on May 21, 1962 in Civil Action No. 23016. Respondent through his attorney made demand upon the Secretary of Revenue of the Commonwealth of Pennsylvania for revocation of the said suspension of the license and owner registration rights. This demand was refused. The Secretary of Revenue cited Section 1414 of The Vehicle Code, 75 Purdon's Statutes 1414, which provides in part:

"Such license, registration shall remain so suspended and shall not be renewed nor shall any such license or registration be thereafter issued in the name of such person, unless and until every such judgment is stayed, satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemption stated in Sections 1413 and 1416 of this Act.

"A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."

No appeal was taken in the State court from the actions of the Secretary of Revenue nor was any appeal taken from the initial decision of the case of *State of Maryland to the use of Louis Ungolo et al. v. Charles Miller et al.*, supra, which held Respondent Miller liable.

Respondent Charles F. Miller filed an action in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 36820 against Theodore B. Smith, Secretary of Revenue of the Commonwealth of Pennsylvania, and Robert Campbell, Supervisor, Financial Responsibility Division. A request by United States District Court Judge, Ralph C. Body, for a three-judge Court pursuant to Sections 2281 and 2284, Title 28 U.S.C.A. was denied by the Honorable Chief Judge, John Biggs, of the same Court. See *Miller v. Smith et al.*, 236 F. Supp. 927 E.D. Pa. (1965).

Subsequently, a Writ of Mandamus was filed in the United States Supreme Court. By Memorandum Opinion dated October 11, 1965, the Supreme Court held Motion for Leave To File Petition for Writ of Mandamus denied. See *Charles F. Miller, Petitioner v. Hon. John Biggs, Chief Judge, etc.*, No. 19 Miscellaneous, 382 U.S. 805, 86 S. Ct. 92 (1965).

The Respondent then filed an amended action to enjoin the Secretary of Revenue and the Supervisor of the Financial Responsibility Division of the Bureau of Motor Vehicles from suspending his driver's license and owner registration rights alleging in that he was deprived under color of State Law of a right secured by Federal Law.

The District Court by Order dated October 1, 1969 ordered that the Petitioners revoke their suspension of the motor vehicle rights of the Respondent, Charles F. Miller, to wit: his owner's certificate and operator's license based upon Sections 1413 and 1414 of 75 Purdon's Statutes because of the reasoning set forth in the Opinion thereto. *Miller v. Smith, Secretary of Revenue of Commonwealth of Pennsylvania et al.*, 236 F. Supp. 927 (E.D. Pa. 1965).

The Respondents then took an appeal to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. 1291. The case was argued on April 20, 1970, before Circuit Judges, Ganey, Van Dusen and Gibbons and later reargued on October 13, 1970, at the request of the Circuit Court before eight Circuit Judges resulting in the Opinion and Judgment of the Circuit Court filed December 7, 1970, deciding that as applied to Respondent Miller,

Section 1414 of the Pennsylvania Motor Vehicle Safety Responsibility Provisions conflicts with Section 17 of the Bankruptcy Act and on that basis the judgment of the District Court was affirmed, *Miller v. Anckaitis,* —— F. 2d ——, 39 U.S. Law Week 2334.

Respondents then petitioned the United States Supreme Court for a Writ of Certiorari to the Court below.

REASONS FOR GRANTING THE WRIT

As to the Petitioners, the Pennsylvania statute in question had not been sustained by the Circuit Court below on the claim of Petitioners that the statute is not in conflict with Section 17 of the Bankruptcy Act, 11 U.S.C. 35, and thus did not violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and is not in conflict with the decided cases of the United States Supreme Court in *Reitz v. Mealey,* 314 U.S. 33, 62 S. Ct. 24, 86 L. Ed. 21 (1941); and *Kessler v. Dept. of Public Safety,* 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962).

It is the hope of the Petitioners that this Court will reexamine these prior decisions and after reconsideration reaffirm those decisions and reverse the Court below.

For the sake of brevity, Petitioners adopt the views stated by the majority of the Justices in both the *Reitz* and *Kessler* cases in support of part of Petitioner's argument for allowance of the Writ of Certiorari.

There are other several and special important reasons for granting of a review on a Writ of Certiorari, to wit:

1. The Circuit Court on December 7, 1970, decided a federal question of substance which was not in accord with the applicable decisions of the United States Supreme Court in *Reitz v.*

Mealey, 314 U.S. 33, 62 S. Ct. 24, 86 L. Ed. 21 (1941) and in *Kessler v. Department of Public Safety of Utah,* 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962).

2. The Circuit Court on December 7, 1970, decided a federal question of substance not in accord with the decision of another Court of Appeals on a similar subject matter and on a similar provision of law which other decision was before the Court below and also cited it in its opinion. That case was *Perez v. Campbell,* 421 F. 2d 619 (9th Circuit Court, January 26, 1970). The Court below also was cognizant of the fact that a Certiorari had been granted in the *Perez* case by the Supreme Court of the United States on October 12, 1970, 91 S. Ct. 71, No. 6, 27 L. Ed. 2d 45, 39 U. S. Law Week 3146. (The *Perez* case has been argued before the U. S. Supreme Ct. on January 19, 1971.)

3. The Circuit Court has decided an important state question in a way which is in conflict with the applicable Pennsylvania Motor Vehicle Financial Responsibility Law.

4. The Circuit Court has decided an important question of federal law wherein the Court below reasoned that the *Reitz* and *Kessler* cases, supra, are distinguishable from the present case; whereas in the *Perez* case, supra, in a different Circuit Court, it was decided that the *Reitz* and *Kessler* cases, supra, are applicable, thus resulting in a conflict of decisions in different Circuit Courts of Appeals.

5. It is respectfully submitted that the United States Supreme Court decide this important question of federal law since there are now two conflicting decisions in different Courts of Appeals. namely, the present case in the Court below and in the *Perez* case, supra, wherein both cases are on a similar subject matter and on a similar state statute.

6. It is respectfully submitted that the United States Supreme Court decide this important question of federal law in that practically all of the fifty states under state law and that of the District of Columbia under an Act of Congress, have a similar provision of law.

7. The Circuit Court has departed from the accepted and usual course of judicial proceedings which calls for an exercise of the United States Supreme Court's power of supervision.

8. The question presented by this case is of great and recurring significance in determining what is the applicable law in all fifty states and in the District of Columbia.

9. The Circuit Court has unwittingly declared that there are two classes of judgment debtors (one class as a result of negligence and another class as a result of a vicarious tort liability resulting from negligence) whereas the applicable statute in Pennsylvania and those of all the other states as well as in the District of Columbia have one class of judgment debtors in their laws.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 18,379

Charles F. Miller

vs.

Victor W. Anckaitis, Secretary of Transportation of the Commonwealth of Pennsylvania and Frank McCormick, Supervisor, Financial Responsibility Division, Bureau of Traffic Safety of the Commonwealth of Pennsylvania,

Appellants

(D.C. Civil Action No. 36820)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Present

Hastie, Chief Judge and Ganey, Freedman, Seitz, Van Dusen, Aldisert, Adams and Gibbons, Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 2, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

Attest:

Thomas F. Quinn
Clerk

December 7, 1970

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 18,379

Charles F. Miller

v.

Victor W. Anckaitis, Secretary of Transportation of the Commonwealth of Pennsylvania, and Frank McCormick, Supervisor, Financial Responsibility Division, Bureau of Traffic Safety of the Commonwealth of Pennsylvania,

Appellants

Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Argued April 20, 1970

Before Ganey, Van Dusen and Gibbons, Circuit Judges

Reargued October 13, 1970

Before Hastie, Chief Judge, Ganey, Freedman, Seitz, Van Dusen, Aldisert, Adams and Gibbons, Circuit Judges

OPINION OF THE COURT
(Filed December 7, 1970)

Reported in —— F. 2d ——
39 U.S. Law Week 2334

Gibbons, Circuit Judge.

In May of 1962 a judgment was entered in the United States District Court for the Eastern District of Pennsylvania against plaintiff Miller, based on his vicarious liability for the negligent driving of his truck by a subagent, whom his truck driver had permitted to drive. The accident took place in Maryland, and the judgment was in favor of a Maryland plaintiff. Because that judgment remained unsatisfied for sixty days, Pennsylvania suspended Miller's motor vehicle operator's license and his owner's registration. On June 10, 1963, he received a discharge in bankruptcy from the vicarious tort liability. On June 19, 1963 he requested the Secretary of Revenue of the Commonwealth to revoke the suspensions. The Secretary declined. Miller then commenced this suit to enjoin the enforcement, as to him, of the Pennsylvania statute which provides for suspension of operator's license and owner's registration of persons against whom a motor vehicle accident judgment remains unsatisfied. He contends that the last paragraph of §1414 of the Pennsylvania Motor Vehicle Safety Responsibility Provisions, Pa. Stat. Ann. Tit. 75, §1414 (1960), is unconstitutional. That section provides:

> A discharge in bankruptcy following the rendering of any such judgment shall not relieve

the judgment debtor from any of the requirements of this article.

It must be read in conjunction with §1413 of the same statute which makes consent of the judgment creditor a necessary condition to restoration of license privileges. His suit presents the issue whether under the supremacy clause or the due process or equal protection clauses a state can impose, as a precondition to the right to own or to drive a motor vehicle, the satisfaction of a private debt, resulting from remote vicarious tort liability, that has been discharged in bankruptcy.

Miller and the district judge to whom the case was assigned, requested a three-judge court. 28 U.S.C. §§2281, 2284. In December, 1964, Chief Judge Biggs declined to convene such a court on the ground that the complaint failed to allege a substantial federal question. Miller v. Smith, 236 F. Supp. 927 (E.D. Pa. 1965). In October, 1965, the Supreme Court denied Miller's motion for leave to file a petition for a writ of mandamus challenging Judge Biggs ruling. The case then proceeded to hearing before a single district judge, who on October 2, 1969 ordered that the Commonwealth authorities revoke their suspension of Miller's operator's license and owner's registration. This appeal followed.

When Mr. Miller undertook his quest for the right to use a car to earn a living, it was clear that only a three-judge court could enjoin enforcement of an unconstitutional statute on supremacy grounds. Kesler

v. Department of Public Safety, 369 U.S. 153 (1962). Justice Warren dissented from that rule. Kesler v. Department of Public Safety, supra at 175. His view is now the law. A single district judge can issue or refuse to issue an injunction on supremacy grounds. Swift & Co. v. Wickham, 382 U.S. 111 (1965). The District Court reached its decision on Fourteenth Amendment grounds. Those grounds would still require a three-judge court and a direct appeal to the Supreme Court. But where, as here, the same facts, which are not in dispute, can support a decision on supremacy grounds we have jurisdiction to affirm.

The Commonwealth contends that Chief Judge Biggs' opinion in Miller v. Smith, supra has already decided the supremacy issue unfavorably to Miller. But whatever is the role of a Chief Judge of a circuit in considering whether or not to convene a three-judge court, it is clear that he could not make any decision on the merits on any issue. His opinion that the supremacy contention was frivolous because of the decision in Kesler v. Department of Public Safety, supra, that of a judge acting in the performance of a limited judicial function, is not controlling.

If Kesler v. Department of Public Safety, supra, and Reitz v. Mealey, 314 U.S. 33 (1941), relied upon in Kesler, were directly in point, we would be obligated to apply them to this case, whatever doubts we might have about their soundness. However, in the present distinguishable situation, we will not extend their holdings and thereby without sound reason fur-

ther erode the healing remedy afforded by §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970).

Both Reitz and Kesler involved drivers of motor vehicles. In Reitz, the Supreme Court upheld the validity of §94-b of the Vehicle and Traffic Law of New York, as applied to a negligent driver. That statute imposed a three-year suspension on a driver who has had an accident in respect of which a judgment convicted him of negligence unless he furnished proof of ability to satisfy the judgment. Justice Roberts for the Court wrote:

> If the statute went no further, we are clear that it would constitute a valid exercise of the State's police power not inconsistent with §17 of the Bankruptcy Act. The penalty which §94-b imposes for injury due to careless driving is not for the protection of the creditor merely, but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankkruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety. Reitz v. Mealey, supra at 37.

The Court expressly abstained from considering the further question whether an amendment to that statute, which put it in the power of the creditor to end the suspension by later exacting payment, was in conflict with §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970). Justice Douglas dissented, saying:

> Under the New York scheme a creditor whose claim has been discharged still holds a club over his debtor's head. The state has given him a remedy which survives bankruptcy. If the bankrupt refuses to pay his discharged debt, the creditor will see to it that his driver's license is suspended. If, however, the bankrupt will pay up, the creditor will refrain.
>
> The practical pressures of this collection device are apparent. Where retention of the operator's license is essential to livelihood, as here alleged, the bankrupt is at the creditor's mercy. Bankruptcy is not then the sanctuary for hapless debtors which Congress intended. The bankrupt, instead of receiving by virtue of his discharge "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" (Local Loan Co. v. Hunt, 292 U.S. 234, 244) finds himself still entangled with a former creditor.
>
> In practical effect the bankrupt may be in as bad, or even worse, a position than if the state had made it possible for a creditor to attach his future wages. Such a device would clearly con-

travene the Bankruptcy Act. Local Loan Co. v. Hunt, supra. The present one likewise runs afoul of the Act. Reitz v. Mealey, supra at 41-42.

Justice Douglas is quite obviously correct that the result of the New York statute (as well as the Pennsylvania statute before us and all the other motor vehicle financial responsibility statutes) is to put in the hands of a judgment creditor a club to enforce payment of reparations for a tort claim.

Kesler brought before the Supreme Court the question reserved in Reitz. In the opinion of the Court, Justice Frankfurter made an exhaustive study of the legislative history of motor vehicle responsibility laws. He did not discuss, however, the legislative history of §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970) though that history would have afforded a helpful guide to the decision of a supremacy question. Justice Frankfurter explained Reitz v. Mealey, supra, as the upholding of the "police power" of a state "exerted for the protection of life and limb". Kesler v. Department of Public Safety, supra at 172. That is, indeed, what Justice Roberts said. It was once argued (and is occasionally still) that a statute making automobile liability insurance compulsory has an adverse impact on safe driving by relieving tortfeasors of the consequences of their negligence. But any driver knows that neither type of statute bears any meaningful relationship to his driving habits or the protection of life and limb. Both are devices adopted to spread the risk of the statistically predict-

able and inevitable number of injuries resulting from motor vehicle operation.

Even accepting the fiction that, as applied to drivers, motor vehicle responsibility statutes are intended to promote safety, it is just too much fiction to contend that, applied to a judgment debtor held vicariously liable for the omission of a subagent, the statute is anything but a means for the enforcement of judgments. Indeed, the effect of the Pennsylvania law in Miller's case is not to prevent a careless person from driving, but to leave Miller no option other than to continue to let others do his driving, the very procedure that resulted in the accident as a result of which his driver's permit has been revoked. Therefore, we think that Reitz and Kesler, which dealt only with judgments against negligent drivers, have no rational application to persons held vicariously liable. As to such drivers, the Pennsylvania statute conflicts with §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970).

In the opinion of the Court in Kesler Justice Frankfurter wrote:

> Utah is not using its police power as a devious collecting agency under the pressure of organized creditors. Victims of careless car drivers are a wholly diffused group of shifting and uncertain composition, not even remotely united by a common financial interest. The Safety Responsibility Act is not an Act for the Relief of Mulcted Creditors. It is not directed to bankrupts as such. Though in a particular case a

> discharged bankrupt who wants to have his rightfully suspended license and registration restored may have to pay the amount of a discharged debt, or part of it, the bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential. Kesler v. Department of Public Safety, supra at 174.

That paragraph constitutes most of the analytical treatment by the Supreme Court majority of the supremacy issue in either Reitz or Kesler.

Two points seem to be involved in that analysis. The first is that motor vehicle tort claimants are for purposes of the Bankruptcy Act different from organized commercial creditors. The second is that deprivation of the right to own or operate a motor vehicle, for the purpose of exacting payment of a discharged debt, impinges only tangentially on the purposes served by the Bankruptcy Act. Were we to accept both points as bases for decision, we would be justified in extending the holdings of Reitz and Kesler to Miller's situation as other circuits have done. See, e.g., Perez v. Campbell, 421 F. 2d 619 (9 Cir. 1970), cert. granted, Oct. 12, 1970, 39 L.W. 3146, and cases therein cited. But believing neither point is valid, we confine the holdings of Reitz and Kesler to their facts.

The first point, that there is a distinction between organized creditors or mulcted creditors on the one hand, and motor vehicle tort claimants on the other, would apply equally to any tort claimants. This being the case, state legislation designed to enforce the

collection, after discharge in bankruptcy, of any tort judgments could theoretically be justified so long as the state found some tenuous safety rationalization for the device. Miller, for example, operated a restaurant, for which his motor vehicle was picking up provisions at the time of the accident. Suppose his chef had left a clam shell in the clam chowder, and a diner broke a tooth; and suppose further that a state statute provided for revocation of Miller's and the chef's "license" to engage in the restaurant trade until the resulting judgment was paid. Nothing in the language or history of the Bankruptcy Act suggests that such a statute would be effective in the face of a discharge. In fact, both language and history point to the opposite conclusion.

Justice Frankfurter's references in Kesler, supra at 174, to the "pressure of organized creditors" and to "[v]ictims of careless car drivers . . . not even remotely united by a common financial interest" suggest an underlying assumption that bankruptcy relief is in the United States intended for the rehabilitation of commercial traders rather than individuals. In footnote 38 he makes this assumption even clearer, when he speaks of the "enormous increase in non-business bankruptcy cases in recent years", Kesler, supra at 173.

Of course there has been such an enormous increase, because there has been an enormous increase in the number of situations in which individuals have needed the benefits of the fresh start afforded by a discharge. Excessive credit for automobile purchases

is one reason for the increase. Increased highway congestion, and the inevitable consequence of highway accidents, is another reason. Nothing in the language or history of §17 suggests that the consequences of these reasons as they affect individuals are in a different category from reasons for bankruptcy affecting traders.

It took until 1898 for Congress to implement Article I, §8, Clause 4 of the Constitution, by the enactment of permanent bankruptcy legislation. Act of July 1, 1898, ch. 541, §§1-70, 30 Stat. 544. In almost every Congress from the First the subject was debated, and those debates, in which over the years the representatives of various sectional and economic interests changed positions, usually centered around two major issues: voluntary bankruptcy and individual bankruptcy. The history of successive enactments and repeals, and the congressional debates thereon, are set forth in detail by Charles Warren in Bankruptcy in United States History (1935). When, in 1898, the 55th Congress enacted the law which has been virtually unchanged since, it provided for voluntary bankruptcy, for individual bankruptcy, and for the discharge of all provable debts. Provable debts did not include unliquidated tort claims, Schall v. Camors, 251 U.S. 239 (1920), but included tort judgments, Lewis v. Roberts, 267 U.S. 467 (1925). The law has never been otherwise since 1898, and there is no basis in the statute or the case law up to Kesler for the distinction suggested by Justice Frankfurter between "victims of careless car drivers" and "organized creditors", Kesler, supra at 174.

Indeed in Miller's case any such distinction, even if it were justified by §17, would blur because Miller was in business and he voluntarily surrendered his business and personal assets, such as they were, for division among his trade creditors and the victims of his subagent's negligence. Such, we suspect, will frequently be the case where a tort judgment is the result of vicarious liability.

Nor is the disability of disqualification from owning or operating a motor vehicle an essentially tangential impingement upon the purposes served by §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970). One cannot ignore the facts of present-day urban existence. A combination of public and private policies have made use of an automobile an actual necessity for virtually everyone who must work for a living. For the urban poor, in particular, remoteness from the thriving suburban segment of the industrial economy and a deteriorating public transportation system often make use of an automobile the only practical alternative to welfare. There is, of course, the choice of insuring adequately. But for the same urban poor the skyrocketing cost of automobile insurance, for which they pay higher premiums than their more affluent suburban neighbors, often makes that alternative impractical. After judgment the uninsured motorist feels the heavy hand of criminal sanctions for driving on the revoked list, Pa. Stat. Ann. Tit. 75, §624(6) (Supp., 1969), as an encouragement to sharing his earnings with his creditor. Today the freedom of action of such a person is almost as effectively circumscribed as was that of

Robert Morris when, after the panic of 1797, he was imprisoned for debt in Prune Street Jail in Philadelphia. Morris was released from jail by virtue of the short-lived Bankruptcy Act of 1800.[1] Many unfortunate judgment debtors can never be restored to the freedom of motion and economic opportunity for which, today, use of an automobile is essential. We decline to enlarge their number by reading the Reitz and Kesler decisions more broadly than is compelled by their exact holdings.

We hold that, applied to Miller, §1414 of the Pennsylvania Motor Vehicle Safety Responsibility Provisions, Pa. Stat. Ann. Tit. 75, §1414 (1960), conflicts with §17 of the Bankruptcy Act, 11 U.S.C. §35 (Supp. V, 1970). On that basis the judgment of the district court will be affirmed.

Ganey, Circuit Judge, dissenting:

I would reach decision here preliminarily, before proceeding to the merits of the case, as my colleagues in the majority have done.

At the time the lower court was considering the complaint before it which alleged claims under the Civil Rights Act, 42 U.S.C. §1983, it is uncertain whether counsel for the plaintiff was permitted to orally amend the amended complaint to add a claim under the Fourteenth Amendment, as he contended at

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[1] Charles Warren, Bankruptcy in United States History, supra at 20.

the hearing, for the record does not disclose any such procedure. However, it is certain from the lower court's opinion that it deemed the complaint averred, in addition to a specific violation of the Supremacy Clause, Article VI of the Constitution, a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment, for it was on the latter ground that it based its decision specifically stating that it was not passing on the question of a violation of the Supremacy Clause, and revoked the order of the Secretary of Revenue withdrawing the plaintiff's driver's license and owner's certificate. See Rule 15 (b) of the Federal Rules of Civil Procedure.

At this juncture of the case the lower court had neither power nor authority alone to pick and choose the grounds for its decision. It was mandated, when the alleged Supremacy Clause of the Constitution violation was asserted, and linked with a Fourteenth Amendment violation, to apply to the Chief Judge of this Circuit for the appointment of a three-judge court under 28 U.S.C. §2281. Swift & Co. v. Wickham, 382 U.S. 111, 125 (1965). Here, the Court held that unless the "*sole*" ground alleged in the complaint was a violation of the Supremacy Clause, Article VI of the Constitution, it must be adjudicated by a three-judge court. (Emphasis ours.)

This holding is further buttressed by the later decision of the Supreme Court in Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad, 382 U.S. 423, 428 (1966), wherein the Court upheld the authority of Swift & Co., supra, and

stated, ". . . that an allegation that a state statute is preempted by a federal statute does not allege the unconstitutionality of the state statute so as to call for the convening of a three-judge court under 28 U.S.C. §2281. Thus, under Swift, the preemption issue in this case *standing alone* would not have justified direct appeal to us under 28 U.S.C. §1253. The complaint here, however, also challenged the Arkansas statutes as being in violation of the Commerce, Due Process and Equal Protection Clauses. In briefs submitted to us after oral argument the appellants have argued that all these constitutional challenges are so insubstantial as a matter of law that they are insufficient to make this an appropriate case for a three-judge court. We cannot accept that argument. Whatever the ultimate holdings on the questions may be we cannot dismiss them as insubstantial on their face. Nor does the fact that the preemption issue alone was passed on by the District Court keep this from being a three-judge case." (Emphasis ours.)

Accordingly, I hold that the district court, as I have indicated, had neither power, nor authority, to make disposition of the issues presented before it, to wit, a violation of the Supremacy Clause of the Constitution, Article VI, when linked with claims under the Due Process and Equal Protection provisions of the Fourteenth Amendment, and in so doing was clearly in error.

I would vacate the judgment of the lower court and remand the case to it with direction that application

be made for the appointment of a three-judge court to the Chief Judge of this Circuit, pursuant to 28 U.S.C. §2281.

Van Dusen, Circuit Judge, dissenting:

If Kesler v. Department of Public Safety, 369 U.S. 153 (1962), and Reitz v. Mealey, 314 U.S. 33 (1941), are to be overruled, I believe the Supreme Court of the United States should take such action. The Pennsylvania statute challenged on supremacy clause grounds in this case is substantially similar in wording, operation, and effect to the Utah statute upheld in the face of a similar challenge in Kesler.[1] If a businessman such as plaintiff knows that his driving privileges will be lost if he has careless employees who permit careless drivers to drive his trucks,[2] the Commonwealth of Pennsylvania may legitimately believe that he will be more careful in selecting such employees and that there will be fewer accidents on its highways. Also, such threatened loss of driving

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[1] *Compare* 75 P.S. §1401 ff. *with* Utah Code Ann., 1953, Tit. 41, c. 12. *See* Kesler v. Dept. of Public Safety, 369 U.S. 153, 166 n. 30 (1962).

[2] In Maryland v. Miller, 210 F. Supp. 193 (E.D. Pa. 1962), the court noted:

> As part of his job Anderson made the trip to Grasonville 15 to 20 times previously. At a time previous to the accident, Anderson had discussed with Miller, his employer, the question of whether or not he could take someone with him to Grasonville for company. Miller made no comment but did not forbid it.

privileges will tend to make the employer more careful when he drives the truck himself.[3]

I would vacate the October 1, 1969, district court order and remand the case to that court so that a three-judge court may be convened to consider plaintiff's Fourteenth Amendment contentions, in the event that the plaintiff makes the appropriate further amendment to the Complaint.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[3] I cannot agree with the statement in the majority opinion at page 6 that "any driver knows that neither type of statute bears any meaningful relationship to his driving habits or the protection of life and limb." *See* Reitz v. Mealey, supra. Also, the denial in the Amended Answer of the allegations of paragraph 9 of the Amended Complaint leaves no factual basis for considering plaintiff as a member of the "urban poor." See pages 9-10 of the opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 36820

Charles F. Miller

v.

Warner M. Depuy, Secretary of Revenue
of the Commonwealth of Pennsylvania

&

Robert Campbell, Supervisor, Financial Responsibility Division, Bureau of Motor Vehicles of the Commonwealth of Pennsylvania

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Reported in 307 F. Supp. 166

OPINION AND ORDER

Body, J., October 1, 1969:

The plaintiff is suing under 42 U.S.C. §1983 to enjoin the Secretary of Revenue and the Supervisor of the Financial Responsibility Division of the Bu-

reau of Motor Vehicles from suspending his driver's license and owner registration rights. Plaintiff's problems arose out of an accident involving plaintiff's truck which occurred on August 30, 1956.

On August 30, 1956, one Anderson, as part of his employment by plaintiff Miller, drove Miller's truck on a regular daily run from Philadelphia to Grasonville, Maryland, on Chesapeake Bay, to buy and transport back a load of freshly-caught crabs to the plaintiff's restaurant, called the Maryland Crab House, in Philadelphia.

The round trip between Philadelphia and Grasonville was between 250 and 275 miles. On this day, Anderson took with him for company his cousin, John Crosby Boyd, age seventeen. As part of his job Anderson had made the trip to Grasonville fifteen or twenty times previously. At a time previous to the accident, Anderson had discussed with Miller, his employer, the question of whether or not he could take someone with him to Grasonville for company. Miller made no comment, but he did not forbid it.

At Grasonville, Anderson and Boyd both helped to load the fresh crabs on the truck and to put ice on them. When the truck was ready to start its return journey to Philadelphia, Anderson felt tired or ill and asked Boyd to drive for him. Although Boyd was only seventeen years old, there is no evidence that he was not a competent driver. Along the way they stopped and Anderson picked up a puppy dog. After a short distance, the puppy dog vomited and

the truck was halted to enable the dog to run a little. As Boyd continued to drive toward Philadelphia, his attention was distracted by the restless antics of the puppy which Anderson was trying to keep on his lap. Because the driver was distracted, the truck veered to the left side of the road where it collided with an approaching automobile being operated by Louis Ungolo. Ungolo and his daughter were injured. His wife and son were killed.

A survival and wrongful death action was brought against Boyd, Anderson and Miller. Judgments totalling $57,783.92 were returned against Boyd and Miller in Civil Action No. 23016 on May 21, 1962. Miller was held liable for Boyd's actions based upon Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A.1 (1923); and Restatement, Agency 2d §79. Section 79, Illustration 5, reads:

> "5. P employs A as a truck driver to carry a valuable load of perishable fruit to a distant town. Enroute, A becomes ill and unable to drive. Being unable to communicate with P, he employs B, a competent driver, to take his place for a trip. It may be found that A was authorized to employ B as P's servant."

The judgment creditors in the above civil action requested the Clerk of the District Court for the Eastern District of Pennsylvania, to send copies of the judgments to the Secretary of Revenue, since these judgments were unsatisfied within sixty (60) days.

In accordance with 75 Pa. Stat. §1413[1] of the Vehicle Code, the Secretary of Revenue suspended the right of the plaintiff to own or operate an automobile in the Commonwealth of Pennsylvania because of the unpaid judgments. No action was taken by the State of Maryland against the plaintiff under

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[1] "Suspension for nonpayment of judgments; exceptions:

(a) The secretary, upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration of any resident operator or owner and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 1416.

(b) If the judgment creditor consents in writing, in such form as the secretary may prescribe, that the judgment debtor be allowed license and registration or nonresident's operating privilege, the same may be allowed by the secretary in his discretion, for six (6) months from the date of such consent, and thereafter until such consent is revoked in writing, notwithstanding default in the payment of such judgment, or of any instalments thereof prescribed in section 1416 provided the judgment debtor furnishes proof of financial responsibility.

(c) Any person whose license, registration or nonresident's operating privilege, has been suspended, or is about to be suspended, or shall become subject to suspension under the provisions of this article may be relieved from the effect of such judgment as hereinbefore prescribed in this article, if such person can present to or file with the secretary proper evidence that a bond or insurance policy as provided for in this article was in force and effect at the time of the accident, resulting in the judgment, and is or should be available for the satisfaction of the judgment to the extent provided for in this article. 1959, April 29, P. L. 58, §1413."

the reciprocal provisions of its act, and the Commonwealth of Pennsylvania did not suspend the privileges of the plaintiff on the basis of any reciprocity.

On June 10, 1963, plaintiff was discharged in bankruptcy from liability to pay the judgment rendered against him on May 21, 1962 in Civil Action No. 23016. Plaintiff through his attorney made demand upon the Secretary of Revenue of the Commonwealth of Pennsylvania for revocation of the said suspension of the license and owner registration rights. This demand was refused. The Secretary of Revenue cited Section 1414, 75 P.S., which provides in part:

> "Such license, registration and nonresident's operating-privilege shall remain so suspended and shall not be renewed nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment is stayed, satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemption stated in Sections 1413 and 1416 of this Act.
>
> A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."

No appeal was taken in the state court from the actions of the Secretary of Revenue.

The plaintiff filed the present action alleging a violation within 42 U.S.C. §1983 [2] in that he was deprived under color of state law, of a right secured by federal law. The plaintiff contends his rights to travel and earn a living have been abridged and that the discharge in bankruptcy under the Supremacy Clause of the U. S. Constitution takes precedence over Sections 1413 and 1414 of the Pennsylvania Financial Responsibility Law.

The state contends that the suspension is within its police powers and relies on a previous decision in this case turning down a three-judge court request [3] which stated that Kesler v. Department of Public Safety of the State of Utah, 369 U.S. 153 (1962), was dispositive of the issue in this case and that no substantial constitutional question was presented requiring a three-judge court. The Kesler decision, discussed further below, upheld the Financial Responsibility Law of Utah.

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[2] "Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of [a]ny rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. §1979."

[3] Miller v. Smith, 236 F. Supp. 927 (E.D. Pa. 1965) (Opinion by Biggs, Ch. J.).

CONCLUSION OF LAW

While the court in Miller v. Smith, 236 F. Supp. 927 (E.D. Pa. 1954) held that a three-judge court was not necessary, this Court is not thereby required to render a verdict for the defendant, as the defendants in their brief suggest. The Kesler decision, this Court believes, is not dispositive of many of the crucial questions presented by this case.

PROCEDURAL ISSUES

This case does not present a problem of exhaustion of administrative remedies since under Damico et al. v. California et al., 389 U.S. 416 (1967) and Monroe v. Pope, 365 U.S. 167 (1961), exhaustion of state remedies is not necessary under Civil Rights Act, 42 U.S.C. §1983. In McNeese v. Board of Education, 373 U.S. 668 (1963) the court noted that the Civil Rights Act was "To provide a remedy in the federal courts supplementary to any remedy any state might have".

In point of fact, the plaintiff had no administrative remedy and was precluded from appealing the suspension in the courts of the state because the suspension under Section 1413 is considered mandatory. It has been held that appeals from suspensions of operators' licenses provided by 75 P.S. §620 do not apply to the Financial Responsibility Section of the Vehicle Code. Com. v. Mercandante, 28 Beaver 104

(1967); Case of Williams Auto License, 17 Bucks 89 (1967).

While there are no allegations of willful or specific intent to deprive plaintiff of his federal rights, it was held in Monroe v. Pope, supra, that such intent is not necessary to state a cause of action under the Civil Rights Act, 42 U.S.C. §1983. It is true that the defendants were acting according to the statutory commands of the Vehicle Code and exercised no discretion since the provisions involved here are mandatory. The statutes themselves are violative of plaintiff's rights. The interest of the public official toward the plaintiff personally has no bearing upon this Court's jurisdiction of the matter.

EQUAL PROTECTION

This Court is of the belief that the plaintiff has been deprived of the equal protection of the laws in certain major respects. The fact that the rights suspended may not be considered to be constitutional rights is ineffective as an argument against denials of equal protection. As the U. S. Supreme Court stated in Sherbert v. Verner, 374 U.S. 398, 404 (1963):

> ". . . the . . . court's construction of the statute [cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege' . . . ."

See also Shapiro v. Thompson, 394 U.S. 618 (1969).

1. That 75 P.S. §1414 (Financial Responsibility Act) does not distinguish between the person who actually is at some fault in causing an accident and a person in plaintiff's position who is held liable upon the vicarious theory of agency embodied in Retatement, Agency 2nd, §7, is constitutionally defective. This is so because the state's exercise of the police power to promote safety on the highway can in no direct and compelling way be served by suspending a person's ownership certificate and operator's license where in fact he has not been shown to be in any way an unsafe *driver.*

This is not even a case where an employer may have been negligent in selecting a driver for his truck. The fortuitous circumstance of his driver becoming sick or tired and thereby necessitating using a stranger to drive, does not indicate that the employer is a danger on the highways.

2. Even if one were to ignore the above conclusion, this Court believes that the Financial Responsibility Act, 75 P.S. §§1413 and 1414, discriminates illegally against the person who is financially unable to pay a personal judgment against him. The fact that someone is able to pay a personal judgment does not by itself indicate that public safety in the future will thereby be promoted. The fact is, the judgment debtor may be perfectly willing to pay his judgment but is simply financially unable to do so. [4]

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[4] Cf. MacQuarrie v. McLaughlin, 294 F. Supp. 176 (D. Mass. 1968), aff'd. 394 U.S. 456 (1969), which takes opposite view.

3. Comparing the ordinary suspension of an operator's license under 75 P.S. §619 with that under 75 P.S. §1413, it becomes readily apparent that the suspension under Section 619 is discretionary with the Secretary of Revenue and provides for a hearing. Section 1413 is mandatory and provides for no hearing. It must be assumed that the legislature believed that a personal judgment would enable the defendant to defend his position with respect to his fault. This logic falls in the face of the instant situation where vicarious responsibility is imposed. While public policy may necessitate holding a person in the position of the instant plaintiff liable for the actions of his agent during the course of his employment, the same reasoning does not demand the taking away of a person's operator's and owner's rights. Legal responsibility for an accident does not automatically indicate that a person himself is an irresponsible driver.

4. A further classification defect not based upon a compelling rational purpose of safety is posed by the fact that no court appeal is allowed for Section 1413 suspensions of operator's permits. Suspensions made under 75 P.S. §619 are provided with a de novo review in Common Pleas Court under Section 620 as are suspensions of operators' licenses and owners' registrations made under Section 1404 (security deposit for accident) and Section 1405 (reciprocity section with other states).

It is also interesting to note that under Section 1405, dealing with failure to post security for an accident in a foreign state:

> ". . . if the law of such state or the District of Columbia contains reciprocal provisions, the secretary shall suspend the license of such resident if he was the *operator* and all of his registrations if he was the owner of a motor vehicle involved in such accident. . . ." [Emphasis supplied.]

The distinction made between owner and operator in this section is further proof of the invidious discrimination worked against the instant plaintiff under Section 1413. At least, if the plaintiff had been required to post security in Maryland and was unable to, under Section 1405 the secretary would only have been able to suspend his registration, not his license. See License of George, 40 D. & C. 2d 768 (1966). This Court does not see any rational distinction which would necessitate taking owners' and operators' rights too, simply because the civil action for the accident took place in Pennsylvania. Therefore, in light of equal protection considerations concerning a comparison of Section 1405 and Section 1413, this Court would have to hold that the operator's license suspension was unconstitutional: However, for the various reasons discussed above, this Court holds that the suspension of the owner's registration and license are both constitutionally defective.

DUE PROCESS

This Court believes that the suspensions involved here restrict plaintiff's liberty under the Fourteenth

Amendment without due process of law. See Wall v. King, 206 F. 2d 878 (1st Cir., 1953), cert. den. 346 U.S. 915. The court in Wall stated:

> ". . . it is unimportant whether, for one purpose or another, a license to operate motor vehicles may properly be described as a mere personal privilege rather than a property right. We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." [p. 882]

The right to drive an automobile is integrally bound up in the right to travel guaranteed by the Supreme Court's interpretation of the United States Constitution. See United States v. Guest, 383 U.S. 745 (1966).

Here the plaintiff is being deprived, probably for life, of his driver's license without any determination that he is an unsafe driver. The suspension is mandatory and provides no right to appeal to a court. There is no right to a hearing. Where plaintiff was not even operating the vehicle, this Court believes that due process demands more.[5] As stated above in connection with equal protection denials, the harsh restrictions cannot possibly increase safety on the highway.

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[5] MacQuarrie v. McLaughlin, supra, takes opposite viewpoint.

In Com. of Pennsylvania v. Raymond A. Conrad, 37 Northumberland L. J. 114 (1965), the court dealt with a situation quite similar to the one at bar. The only difference was that the suspension of the defendant's license there was based upon Section 1405. The defendant's son drove the defendant's car, uninsured, from Pennsylvania to New York where he was going to college. He did not have permission to use the car while at college. The son did use the car and became involved in an accident. The father could not post $2,800 as surety under New York's Financial Responsibility Law, and Pennsylvania recognized the New York suspension of motor vehicle rights under 75 P.S. §1405. The suspension was appealed and heard de novo in the Court of Common Pleas. The court stated:

> "We believe here, however, there has been submitted to this court extenuating facts and circumstances which when considered together with the economic hardship do not justify the present suspension." [p. 118]

The court was alluding to the "extenuating facts and circumstances" of the father not having operated the car at the time of the accident. The same reasoning must be applied to the instant case.

SUPREMACY CLAUSE

Since the Court has decided that the suspensions here involved were violative of both the due process

and equal protection clauses of the Fourteenth Amendment, there is little reason left to distinguish the cases of Kesler v. Department of Public Safety of the State of Utah, 369 U.S. 153 (1962) and Reitz v. Mealey, 314 U.S. 33 (1941).[6] In Reitz the court upheld New York's Financial Responsibility Law against claims that it conflicted with the Federal Bankruptcy Law and was therefore void under the Supremacy Clause of the Constitution. The court also upheld the law in face of due process arguments.

Kesler upheld Utah's Financial Responsibility Law against objections that it violated the Supremacy Clause because it allowed the creditor control over initiation and duration of the suspension of the driving rights. The court held that valid state interests were being served by the Financial Responsibility Law and that the creditor had such power was insufficient to state a constitutional claim under the Supremacy Clause.

Both Reitz and Kesler were dealing with cases where the suspensions were rendered against negligent operators themselves. This Court believes this fact is very crucial to due process and equal protection considerations, for, the court in Kesler was deeply impressed by the fact that the Financial Responsibility Law was apparently adopted to promote the legitimate state interest of highway safety. The safety interest cannot be served, this Court believes, when no negligence can be attributed to the judgment debt-

[6] Neither considered equal protection arguments.

or. The primary effect of the statutes involved here is solely for the collection of a debt. The court in Kesler, referring to Reitz, had this to say about such a purpose:

> ". . . Because the statute was not designed to aid collection of debts but to enforce a policy against irresponsible driving, and because this policy would be frustrated if *negligent* drivers could avoid the statute by 'the simple expedient of voluntary bankruptcy', no conflict with the Bankruptcy Act was found." [p. 169] [Emphasis supplied.]

Without deciding whether the Supremacy Clause was violated in this case, this Court takes the position that Kesler and Reitz are clearly distinguishable from the present case.

ORDER

Accordingly, this first day of October, 1969, It Is Ordered that the defendants revoke their suspension of the motor vehicle rights of the plaintiff, Charles F. Miller, to wit: his owner's certificate and operator's license, based upon Sections 1413 and 1414 of 75 Purdon's Statutes.

(s) Ralph C. Body
J.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 36820

Charles F. Miller
3206 Frankford Avenue
Philadelphia, Penna.

v.

Theodore B. Smith
Secretary of Revenue of the Commonwealth
of Pennsylvania

&

Robert Campbell, Supervisor
Financial Responsibility Division,
Bureau of Motor Vehicles
State Office Building
1400 Spring Garden Street
Philadelphia, Penna.

Reported 236 F. Supp. 927

OPINION

By Biggs, Chief Judge.

I am in receipt of a request from a United States District Judge for the Eastern District of Pennsyl-

vania for the designation of two other judges to constitute with him, a district court of three judges pursuant to Sections 2281, 2284, Title 28, U.S.C., to head and determine this case, which is alleged to involve the constitutional validity of 75 P.S. Sections 1413 and 1414, Article XIV, the "Motor Vehicle Safety Responsibility Provisions of the Pennsylvania Vehicle Code", which are asserted to be in conflict with Section 17 of the Bankruptcy Act, 11 U.S.C.A., Section 35. A brief statement of the allegations of the complaint is necessary. The plaintiff, Miller, alleges that a truck belonging to him [1] was involved in a highway accident in Maryland on August 30, 1956, but that the truck was not being driven by Miller nor by any agent or employee of his but "was driven by a stranger who was permitted to drive the truck by . . . [an] employee of . . . [Miller] while in Maryland and without the consent or knowledge or approval" of Miller; that judgments totalling $57,783.92 were entered against Miller because of the accident in the United States District Court for the Eastern District of Pennsylvania on May 21, 1962, at C.A. No. 23016, in favor of the Ungolos, the plaintiffs in that action; that Miller thereafter filed an involuntary petition in bankruptcy in the United States District Court for the Eastern District of Pennsylvania, and that he scheduled the judgments referred

[1] While there is no direct allegation that Miller was the owner of the truck, nonetheless there is a collateral statement in paragraph 9 of the complaint that it was "his", Miller's, "motor vehicle" that was involved in the Maryland accident.

to and was duly discharged as a bankrupt on June 19, 1963.

The complaint further alleges that it was not the duty of the Clerk of the United States District Court for the Eastern District of Pennsylvania to forward to the Secretary of Revenue of the Commonwealth of Pennsylvania a certified copy of judgments entered against him but the Ungolos, as judgment creditors, requested the Clerk to do so; that the Clerk complied with this request in accordance with 75 P.S. Section 1413, and that the Secretary of Revenue thereupon suspended Miller's right to operate an automobile or to register ownership thereof, and that these suspensions remain in full force and effect. The complaint also recites that no appeal is possible from this action of the Secretary of Revenue; [2] that the Secretary's act was mandatory and not discretionary. It appears from the record at C.A. No. 23016 that Miller took no appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania against him and in favor of the Ungolos. The complaint also alleges that Section 1405 of the Pennsylvania Vehicle Code provides for reciprocity between various states of the United States and the State of Maryland has a reciprocity agreement with the Commonwealth of Pennsylvania but that no action was taken by the State of Maryland against Miller "under a section similar to Section 1405" of the Pennsylvania statute and that, therefore, the Commonwealth of Pennsylvania did not act

[2] But cf. Meyer License, 33 D. & C. 2d 790 (1963).

against Miller on the basis of any reciprocity agreement.

The complaint further recites that Miller, at the time of filing his petition in bankruptcy, operated a one-man business selling live crabs on a retail basis and that in the course of his business it was necessary for him to drive to various shore points near Philadelphia in order to transport the crabs in a motor vehicle to his place of business; [3] that by reason of his failure to pay the Ungolo judgments based upon the "negligence of a stranger" in the operation of "his", Miller's, motor vehicle on highways outside of Pennsylvania, the action of the Commonwealth of Pennsylvania has deprived him of his livelihood "despite . . . [his] willingness to furnish proof of financial responsibility in the future"; that the bar against him is for life because his earning capacity is so meager that his lifetime earnings will not permit him to pay the judgments. He concludes by stating, as we have already pointed out, that by reason of the bar of his discharge under the Bankruptcy Act he is no longer obligated to pay these judgments, and that the refusal of the Secretary to reinstate him in the privileges which he seeks is unconstitutional. He prays for an injunction, mandatory in its nature, to compel the Secretary to restore his right to drive and his right to register an automobile in the Commonwealth of Pennsylvania.

The Motor Vehicle Safety Responsibility Provisions of the Pennsylvania Vehicle Code, 75 P.S. 1401 et seq., and the particular sections, Sections 1413 and

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[3] Which, it is assumed, was Philadelphia.

1414, which Miller attacks, are in substance very similar to the pertinent Sections of the Safety Responsibility Act of the Utah Code Annotated, 1953, Section 41-12-1, et seq.,[4] which were considered in Kesler v. Department of Public Safety, 369 U.S. 153 (1962). In respect to the case at bar the Kesler case both raises a ghost and lays it. In that case the Supreme Court had before it, as we have indicated, pertinent provisions of the Safety Responsibility Act of the Utah Code similar to those in the case at bar, which, like those at bar, were attacked on the ground that Section 17 of the Bankruptcy Act, 11 U.S.C.A. Section 35, applicable through the Supremacy Clause, Article VI, rendered that case adjudicable only by a three-judge court designated by the chief judge of the circuit pursuant to Sections 2281 and 2284, 28 U.S.C. But the Supreme Court, having decided that the issues presented by the Kesler case were adjudicable only by a three-judge court, also decided that the Utah statute there under attack could stand despite the provisions of Section 17 of the Bankruptcy Act as brought into play by the Supremacy Clause. It appears then that the issue presented by the case at bar raises no substantial constitutional question and falls within the ruling of Ex Parte

[4] The provisions of the pertinent sections, Section 120, et seq., of Article 66½ of the title, "Motor Vehicles" of the Annotated Code of Maryland, 1957, are more detailed but are not much broader in scope than the corresponding provisions of the Utah Act and the Pennsylvania Act.

See Kesler v. Department of Safety, 369 U.S. 153, at 165-168; see also id. at pp. 166-167 at n. 30.

Poresky, 290 U.S. 30, 32 (1933), as set out immediately hereinafter: "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. Mosher v. Phoenix, 287 U.S. 29, 30; Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105. The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject to controversy.' Levering & Garrigues Co. v. Morrin, supra; Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288; McGilvra v. Ross, 215 U.S. 40, 80." Here no substantial constitutional issue remains to be adjudicated because the Supreme Court has already decided it unfavorably to Miller in the Kesler decision.[5]

But a major issue remains to be determined. Does a chief judge of a circuit possess the power, or the authority, or the duty, when notified by a district judge of the circuit that an application has been made to him for an injunction in a case which, in the opinion of the district judge, requires adjudication by a three-judge court pursuant to Sections 2281 and 2284, Title 28, U.S.C., to refuse to designate such a

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[5] A paragraph of the letter of the District Judge to the Chief Judge states: "There is some doubt in my mind as to whether or not he [the plaintiff, Miller] is entitled to a three-judge court because of the case of Kesler v. Department of Public Safety, 369 U.S. 153."

court if in the opinion of the chief judge the notification of the district judge is erroneous and the designation of the two additional judges therefore should not be made? Or should the chief judge of the circuit, as a ministerial act, without considering the question of whether the case is one adjudicable by a three-judge tribunal, proceed to designate, two other judges to make up the three-judge court? If the three-judge district court is erroneously designated and that court as constituted tries the case a great deal of the time and energy of judges, counsel and litigants may be wasted.[6] Of course, if the case is not one adjudicable by a three-judge court ordinarily an appeal will not lie to the Supreme Court, 28 U.S.C. Section 2101(b), and the error of the three-judge tribunal in wrongfully assuming jurisdiction and adjudicating the case, would have to be corrected by the appropriate court of appeals.[7]

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[6] Before that tribunal can determine its jurisdictional fact it must be constituted by the chief judge; it must hold a hearing and render its decision. It must do so even if it is utterly apparent that no substantial constitutional question is presented under the ruling of Ex Parte Poresky, 290 U.S. 30, 32 (1933). On the other hand, there are cases in which it is difficult to determine whether it should be adjudicated by a three-judge court or a single-judge court. See Johns v. Allen, 231 F. Supp. 852 (D.C. Del., 1964). Sound judicial husbandry would seem to indicate a differentiation in the treatment of the two kinds of cases just referred to. What has been said, does not, of course go to the issue of the nature of the power of the chief judge.

[7] It should be noted that where a three-judge court has been convened to review the constitutionality of a statute,

It is clear that when a United States district judge has failed to effect the notification or to make the request required by Section 2284(1), the Supreme Court will grant mandamus. See Stratton v. St. Louis S. W. Railway Co., 282 U.S. 10, 16 (1930). But is there a remedy other than an appeal to the Supreme Court to aid the injured litigant in the case where a district judge has given notification to the chief judge of the circuit of the filing of a case which on the pleading requires adjudication by a three-judge court and the chief judge erroneously fails or refuses to act upon the notification by constituting such a court? I conclude that the remedy of mandamus is available and that the Supreme Court would issue such a writ to a chief judge who failed to act.[8]

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where a court so constituted was not required, under certain circumstances, the Supreme Court may see fit to treat the jurisdictional statement filed in support of the plaintiff-appellant's appeal to the Supreme Court as a petition for certiorari prior to the judgment of the court of appeals under 28 U.S.C. Sections 1254(1) and 2101(e), grant the petition and remand the case to the district court to enter a decree granting appropriate relief to the plaintiff-appellant. See Turner v. City of Memphis, 369 U.S. 350 (1962). Compare Bailey v. Patterson, 369 U.S. 31 (1962). It should be noted, however, that in Turner v. City of Memphis, supra, the case had not proceeded to trial; that in Bailey v. Patterson, supra, a three-judge court was not required though one had been convened. In Bailey v. Patterson the Supreme Court remanded the case to the end that the plaintiffs-appellants' claims should be adjudicated by a single-judge district court.

[8] I have been unable to find any case in point.

But this brings us back to the underlying problem. Is the act of the chief judge of the circuit in designating two other judges to sit with the district judge to whom the application for a three-judge court was made a purely ministerial one as suggested in the preceding paragraph but one, or does the chief judge have the power and the duty, as does the district judge to whom the application was made, to determine whether or not the case upon which the district judge's notification is founded is a three-judge case in reality? The question may be stated in another way as follows. Is there the instant requirement of a three-judge court as soon as the certification is made by the district judge, however erroneously, to the chief judge of the circuit or does the chief judge of the circuit exercise a separate judicial function to determine, before constituting the three-judge court, whether the case is one adjudicable by a three-judge tribunal or whether it is one adjudicable by a single-judge district court? Such a court would, of course, when constituted, have the power to determine whether or not it had the jurisdiction to determine its jurisdiction to decide the case: i.e., to determine whether or not the case is adjudicable by a three-judge court.

Some light is thrown on this fundamental issue by the development of the statute providing for three-judge courts. The original statute, the Act of March 4, 1911, 36 Stat. 1150, 1162-63,[9] put the power to

[9] Section 266 of the Act of March 4, 1911, 36 Stat. 1162, provides: "No interlocutory injunction suspending or re-

create a three-judge court in the hands of the district judge to whom the application was made, as well as in the hands of a Circuit Justice or a circuit judge, depending on how the application was made. If the application was made to the district judge, he had the power to call to his assistance two other judges, one of whom could be the Circuit Justice, who might indeed have been the Chief Justice of the United States, a procedure which was eliminated in the 1948 revision of the Judicial Code.

The second relevant statute, the Act of October 22, 1913, 38 Stat. 219, 220, provided that no *interlocutory* injunction to suspend or restrain the enforcement of an order of the Interstate Commerce Commission

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straining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. . . ."

should issue unless the application for the injunction was presented to a circuit or district judge and was heard and determined by three judges, of whom one at least was a circuit judge, and unless a majority of the three judges should concur in granting the application. The statute further provided that when such an application was presented to a circuit or district judge he should call to his assistance to hear and determine the application, two other judges. As has been stated, the statute provided that one of the judges called would have to be a circuit judge, but the designation of the judges to sit with the judge to whom the application was made was left to the district judge if the application for a three-judge court was made to him.

But the third pertinent statute made a distinct change in the procedure of summoning a three-judge court where an injunction, either permanent or interlocutory, was sought to enjoin the enforcement or operation of an Act of Congress but it did not trench upon the procedure specified by the Act of March 4, 1911, 36 Stat. 1150, 1162-63, in respect to state statutes. I refer to the Act of August 24, 1937, 50 Stat. 751, 752, which provided, among other things for a direct appeal to the Supreme Court of the United States from a United States district court where the constitutionality of an act of Congress was brought into question. Section 3 of the 1937 Act provided: "No interlocutory or permanent injunction supending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any

part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately, two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination." It will be noted that for the first time in this Act the senior circuit judge, now the chief judge of the circuit, is brought into the procedure and plays a decisive part.

The amendments effected by the Act of April 6, 1942, 56 Stat. 198-9, are not pertinent here and for that reason they are not set out or discussed here.

The final pertinent changes to the procedure for selecting three-judge courts were effected by Section 2284 of Title 28 of the Judicial Code which as presently constituted was enacted in 1948 as a complete revision of the prior statutes on the subject. The provisions of Section 2284 are, of course, substan-

tive law but there are no substantial differences between the provisions of Section 2284 as it presently exists and those of Section 3 of the Act of August 24, 1937, 50 Stat. 752. The relevant portions of Section 2284 are as follows: *"Three-judge district court; composition; procedure."* In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding." [10]

The second paragraph quoted, under "(1)" supra, must be read in the light of and must be deemed to be modified and governed by the first paragraph quoted. On the filing of the application to the district judge, when a proceeding has been filed which requires a three-judge court for its adjudication, the district judge must notify the chief judge of the cir-

[10] It will be observed that Section 2284, Title 28, U.S.C. has drawn the provisions for designating three-judge courts for determining the validity of Acts of Congress and State Statutes and orders of the Interstate Commerce Commission into a single statute providing uniformity of designation and procedure.

cuit that there is a case which has the legal status specified by the statute. The district judge performs an act of judicial judgment and concludes as a matter of law that the pending case is one requiring three judges for its adjudication. He then notifies the chief judge of his decision and requests the chief judge to designate the two other judges who shall sit with him. The second paragraph quoted, "(1)", supra, provides that the district judge "shall" do these things when the proceeding requires it. It can be said with certainty that the district judge's functions in this regard are judicial rather than ministerial. See Bailey v. Patterson, 369 U.S. 31 (1962), and Turner v. City of Memphis, 369 U.S. 350, 353-54 (1962).

A narrow reading of the second paragraph of Section 2284 "(1)" as quoted would require that the district judge "on the filing of the application" "shall" "immediately notify the chief judge of the circuit." This would reduce the course to be followed by the district judge to mere ministerial action. But it has been demonstrated in the preceding paragraph that his notifying of the chief judge requires the exercise of a judicial act on his part. He performs that act in the light of the first paragraph quoted. A narrow reading of the first paragraph "(1)", would require the chief judge forthwith and in all events to designate two other judges. Again the word employed by Congress is "shall" : i.e. the chief judge, on receiving the request of the district judge for a three-judge court, the notification, "shall designate two other judges." But this is too narrow a reading. The chief judge must perform his functions

in the light of the first paragraph of Section 2284 quoted above: i.e., he must, as a judicial act determine that the proceeding or case in which the three-judge court is sought to be invoked, is actually one requiring adjudication by a three-judge tribunal. There, therefore, must be two judicial acts performed before a three-judge court may be constituted: the first by the district judge; the second by the chief judge of the circuit.[11] The constituting of a three-judge court requires two separate acts of judicial judgment as indicated, neither merely ministerial. This conclusion, if it be correct, should effect a saving in the time and energy of litigants, of counsel and of judges.

I conclude for the reasons heretofore stated that this is not a case which requires a three-judge court to adjudicate it. I therefore decline to designate two judges to sit with the judge to whom the application for a three-judge court was made. If I am in error the remedy, I think, should be by way of a writ of mandamus directed by the Supreme Court to me as the chief judge of the circuit. If the district judge to whom the application was made should agree with

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[11] No pertinent legislative history has been found which throws any light on the difficult questions of statutory construction presented. It can be argued with some force that the senior circuit judge of the circuit (now the chief judge of the circuit) was brought into the procedure by the Act of August 24, 1937, because he would have immediately at hand information as to which circuit judge or judges of his circuit would be available for three-judge court duty. The argument is not persuasive in the light of the terms of the statute.

the view expressed in this opinion I can perceive no reason why he cannot now rescind the request he made to me for a three-judge tribunal, Eastern States Petroleum Corporation v. Rogers, 265 F. 2d 593, 597 (Prettyman, Ch. J., D.C. Cir., mandamus denied 361 U.S. 805 (1959)), and, having done so, proceed to dispose of the case precisely as he would have done had he determined in the first instance that the case at bar was not one requiring the interposition of a three-judge tribunal.

An alternative course for me to pursue in order to avoid a possible mandamus would be for me to designate forthwith two judges to sit with the district judge to whom the application for a three-judge tribunal was made in this case. If it appeared to the district court as thus constituted that the cause was one not cognizable by a three-judge tribunal, the court could then dissolve itself as a three-judge district court and remit the case to the single judge to whom the application was made for his sole disposition. That this practice is permissible is, I think, well established. See Two Guys From Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 432-3 (3 Cir. 1959). But if the appeal was to the Court of Appeals of this Circuit and the case is in reality one which is cognizable only by a three-judge tribunal, the Court of Appeals could decide only the very limited issue as to whether or not it had jurisdiction to entertain and adjudicate the appeal and could only vacate an improvident order of the single district judge tribunal as was done in the Two Guys case, supra. Such a course would hardly prove helpful

here. If the case now pending in the district court is in fact a three-judge case and the district judge had refused to request me, as chief judge of the circuit, to designate two additional judges to constitute a three-judge tribunal, relief to the suitor would be by way of mandamus directed to the district judge from the Supreme Court of the United States. The waste of the time and energy of litigants, of counsel and of judges will occur in those cases where no appeal is taken until after the case is tried and where constitutional issues involving federal or state statutes are at issue. The waste of time and energy may be very considerable for the trial court may reach a final judgment only to discover later that it was without jurisdiction to determine the case. The case at bar, of course, has not been tried.

On consideration of all of the factors and being of the opinion that the chief judge of the circuit has the duty to determine judicially whether the case is one which is adjudicable by a three-judge tribunal, as had the district judge to whom the application is made, I conclude, with all respect and esteem for the District Judge who made the request of me, that the action is not one cognizable by a three-judge tribunal, and further that the ends of justice would be best served by my declining to designate two additional judges to complete a three-judge tribunal in this case. Consequently, an order to that effect will be filed in the district court concurrently with this opinion.

John Biggs, Jr.,
Chief Judge,
December 31, 1964. *Third Circuit.*

ORDER

Biggs, Chief Judge of the Third Circuit.

And now, to wit, this 31 day of December, 1964, upon consideration of the pleadings in the above entitled action and of the memorandum of law of Counsel for the plaintiff, and upon consideration of the notification and request of the Honorable Ralph C. Body, a Judge of the United States District Court of the Eastern District of Pennsylvania, to whom the plaintiff's application was made for a three-judge statutory court pursuant to §§2281 and 2284, Title 28 U.S.C., and it appearing to the undersigned as Chief Judge of the Third Circuit, that no cause of action is presented cognizable by a three-judge statutory court as requested, it is

Ordered that the request for the designation of two additional judges to sit with the Honorable Ralph C. Body to hear and determine the above entitled action be and the same hereby is denied.

John Biggs, Jr.
Chief Judge
Third Judicial Circuit

December 31, 1964.

ORDER

And now, to wit, this 4th day of January, 1965, it is

Ordered that the opinion handed down herein by the undersigned on December 31, 1964, be and the same hereby is amended:

(1) By striking from page 5 thereof, lines 15 and 16, as presently written as follows, "then that the issue presented by the case at bar raises no substantial constitutional question and falls within the", and substituting in lieu thereof the following, "then that the issue presented by the case at bar can raise no substantial question as to the constitutionality of the Pennsylvania statutes and falls within the";

(2) By striking from page 6 thereof, lines 4 and 5, as presently written as follows, "constitutional issue remains to be adjudicated because the Supreme Court has already decided it unfavorably to Miller", and substituting in lieu thereof the following, "issue as to the constitutionality of the Pennsylvania statutes remains to be adjudicated because the Supreme Court has already decided that issue unfavorably to Miller";

(3) By adding on page 6, after the figure "5" at the end of line 6 on that page, the following additional sentence, "The issues as to whether Miller's right to operate a motor vehicle or to register owner-

ship thereof were lawfully suspended may be decided by a single judge of the United States District Court for the Eastern District of Pennsylvania, assuming but not deciding, that that court has jurisdiction of the pending action and assuming further that the doctrine of abstention should not be applied.";

(4) By striking out of the first line of footnote 6 the word "its" and substituting in lieu thereof the word "this";

(5) By inserting in line 4 of footnote 6 immediately after the word "question", the following phrase, "as to the statute under consideration";

(6) By striking from line 7 of footnote 6 the phrase, "it should be adjudicated" and substituting in lieu thereof the following, "the adjudication should be made";

(7) By striking from page 9 thereof, lines 3 and 4 as follows, "would, of course, when constituted, have the power to determine whether or not it had the jurisdiction to determine its juris-", and substituting in lieu thereof the following, "would, of course, when constituted, have authority to decide whether or not it had the power to determine its juris-";

(8) By striking from page 12 thereof, line 6, the word "Judicial", and substituting in lieu thereof the phrase "United States".

John Biggs, Jr.
Chief Judge
Third Judicial Circuit

ORDER

And Now, to wit, this 8th day of January, 1965, it is

Ordered that the Opinion filed herein by the undersigned on December 31, 1964, as amended by the Order filed herein on the 4th day of January, 1965, be and the same hereby is further amended:

(1) By striking from page 12 thereof, line 2, the word "here";

(2) By inserting upon page 13 thereof, line 1, a comma after the symbols and figure "'(1)'";

(3) By striking from page 13 thereof, line 18, the symbols and figures "(1962)";

(4) By striking from page 13 thereof, line 18, the letters and figures "369 U.S. 350" and substituting in lieu thereof, the phrase "*id.*, at";

(5) By striking from page 14 thereof, line 2, the word "first" and substituting in lieu thereof the word "second";

(6) By striking from page 16 thereof, line 14, the period after the phrase "United States" and substituting in lieu thereof the following, "as previously noted herein.";

(7) By striking from page 17 thereof, line 5, the word "complete" and substituting in lieu thereof the word "constitute"; and

(8) By inserting upon page 17 thereof, line 5, following the word "case.", the following sentence: "See Kirk v. Board of Education, F. Supp. (D.C. E.D. Pa. 1964)."

(s) John Biggs, Jr.
Chief Judge
Third Judicial Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 36820

Charles F. Miller
3206 Frankford Avenue
Philadelphia, Penna.

v.

Theodore B. Smith
Secretary of Revenue of the Commonwealth
of Pennsylvania

&

Robert Campbell, Supervisor
Financial Responsibility Division,
Bureau of Motor Vehicles
State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania

Filed January 8, 1965

Reported in 236 F. Supp. 927

OPINION

(Filed Jan. 8, 1965)
(As Amended by Order of January 4, 1965, and as Amended Further by Order of January 8, 1965)

By Biggs, Chief Judge.

I am in receipt of a request from a United States District Judge for the Eastern District of Pennsylvania for the designation of two other judges to constitute, with him, a district court of three judges pursuant to Sections 2281 and 2284, Title 28, U.S.C., to hear and determine this case, which is alleged to involve the constitutional validity of 75 P.S. Sections 1413 and 1414, Article XIV, the "Motor Vehicle Safety Responsibility Provisions of the Pennsylvania Vehicle Code", which are asserted to be in conflict with Section 17 of the Bankruptcy Act, 11 U.S.C.A., Section 35. A brief statement of the allegations of the complaint is necessary. The plaintiff, Miller, alleges that a truck belonging to him [1] was involved in a highway accident in Maryland on August 30, 1956, but that the truck was not being driven by Miller nor by any agent or employee of his but "was driven by a stranger who was permitted to drive the truck by . . . [an] employee of . . . [Miller] while

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[1] While there is no direct allegation that Miller was the owner of the truck, nonetheless there is a collateral statement in paragraph 9 of the complaint that it was "his", Miller's, "motor vehicle" that was involved in the Maryland accident.

in Maryland and without the consent or knowledge or approval" of Miller; that judgments totalling $57,783.92 were entered against Miller because of the accident in the United States District Court for the Eastern District of Pennsylvania on May 21, 1962, at C.A. No. 23016, in favor of the Ungolos, the plaintiffs in that action; that Miller thereafter filed an involuntary petition in bankruptcy in the United States District Court for the Eastern District of Pennsylvania, and that he scheduled the judgments referred to and was duly discharged as a bankrupt on June 19, 1963.

The complaint further alleges that it was not the duty of the Clerk of the United States District Court for the Eastern District of Pennsylvania to forward to the Secretary of Revenue of the Commonwealth of Pennsylvania a certified copy of judgments entered against him but the Ungolos, as judgment creditors, requested the Clerk to do so; that the Clerk complied with this request in accordance with 75 P.S. Section 1413, and that the Secretary of Revenue thereupon suspended Miller's right to operate an automobile or to register ownership thereof, and that these suspensions remain in full force and effect. The complaint also recites that no appeal is possible from this action of the Secretary of Revenue; [2] that the Secretary's act was mandatory and not discretionary. It appears from the record at C.A. No. 23016 that Miller took no appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania

[2] But cf. Meyer License, 3° D. & C. 2d 790 (1963).

against him and in favor of the Ungolos. The complaint also alleges that Section 1405 of the Pennsylvania Vehicle Code provides for reciprocity between various states of the United States and the State of Maryland has a reciprocity agreement with the Commonwealth of Pennsylvania but that no action was taken by the State of Maryland against Miller "under a section similar to Section 1405" of the Pennsylvania statute and that, therefore, the Commonwealth of Pennsylvania did not act against Miller on the basis of any reciprocity agreement.

The complaint further recites that Miller, at the time of filing his petition in bankruptcy, operated a one-man business selling live crabs on a retail basis and that in the course of his business it was necessary for him to drive to various shore points near Philadelphia in order to transport the crabs in a motor vehicle to his place of business; [3] that by reason of his failure to pay the Ungolo judgments based upon the "negligence of a stranger" in the operation of "his", Miller's motor vehicle on highways outside of Pennsylvania, the action of the Commonwealth of Pennsylvania has deprived him of his livelihood "despite . . . [his] willingness to furnish proof of financial responsibility in the future"; that the bar against him is for life because his earning capacity is so meager that his lifetime earnings will not permit him to pay the judgments. He concludes by stating, as we have already pointed out, that by reason of the bar of his discharge under the Bankruptcy Act he is no long-

[3] Which, it is assumed, was Philadelphia.

er obligated to pay these judgments, and that the refusal of the Secretary to reinstate him in the privileges which he seeks is unconstitutional. He prays for an injunction, mandatory in its nature, to compel the Secretary to restore his right to drive and his right to register an automobile in the Commonwealth of Pennsylvania.

The Motor Vehicle Safety Responsibility Provisions of the Pennsylvania Vehicle Code, 75 P.S. 1401 et seq., and the particular sections, Sections 1413 and 1414, which Miller attacks, are in substance very similar to the pertinent Sections of the Safety Responsibility Act of the Utah Code Annotated, 1953, Section 41-12-1, et seq.,[4] which were considered in Kesler v. Department of Public Safety, 369 U.S. 153 (1962). In respect to the case at bar the Kesler case both raises a ghost and lays it. In that case the Supreme Court had before it, as we have indicated, pertinent provisions of the Safety Responsibility Act of the Utah Code similar to those in the case at bar, which, like those at bar, were attacked on the ground that Section 17 of the Bankruptcy Act, 11 U.S.C.A. Section 35, applicable through the Supremacy Clause, Article VI, rendered that case adjudicable only by a three-judge court designated by the chief judge of

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[4] The provisions of the pertinent sections, Sections 120, et seq., of Article 66½ of the title, "Motor Vehicles" of the Annotated Code of Maryland, 1957, are more detailed but are not much broader in scope than the corresponding provisions of the Utah Act and the Pennsylvania Act.

See Kesler v. Department of Public Safety, 369 U.S. 153, at 165-168; see also id. at pp. 166-67 at n. 30.

the circuit pursuant to Sections 2281 and 2284, 28 U.S.C. But the Supreme Court, having decided that the issues presented by the Kesler case were adjudicable only by a three-judge court, also decided that the Utah statute there under attack could stand despite the provisions of Section 17 of the Bankruptcy Act as brought into play by the Supremacy Clause. It appears then that the issue presented by the case at bar can raise no substantial question as to the constitutionality of the Pennsylvania statutes and falls within the ruling of Ex Parte Poresky, 290 U.S. 30, 32 (1933), as set out immediately hereinafter: "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. Mosher v. Phoenix, 287 U.S. 29, 30; Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105. The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' Levering & Garrigues Co. v. Morrin, supra; Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288; McGilvra v. Ross, 215 U.S. 40, 80." Here no substantial issue as to the constitutionality of the Pennsylvania statute remains to be adjudicated because the Supreme Court has already decided that issue unfavorably to Miller in the Kesler decision. [5]

[5] A paragraph of the letter of the District Judge to the Chief Judge states: "There is some doubt in my mind as

The issues as to whether Miller's right to operate a motor vehicle or to register ownership thereof were lawfully suspended may be decided by a single judge of the United States District Court for the Eastern District of Pennsylvania, assuming but not deciding, that that court has jurisdiction of the pending action and assuming further that the doctrine of abstention should not be applied.

But a major issue remains to be determined. Does a chief judge of a circuit possess the power, or the authority, or the duty, when notified by a district judge of the circuit that an application has been made to him for an injunction in a case which, in the opinion of the district judge, requires adjudication by a three-judge court pursuant to Sections 2281 and 2284, Title 28, U.S.C., to refuse to designate such a court if in the opinion of the chief judge the notification of the district judge is erroneous and the designation of the two additional judges therefore should not be made? Or should the chief judge of the circuit, as a ministerial act, without considering the question of whether the case is one adjudicable by a three-judge tribunal, proceed to designate two other judges to make up the three-judge court? If the three-judge district court is erroneously designated and that court as constituted tries the case a great deal of the time and energy of judges, counsel and litigants may be wasted. [6] Of course, if the case is not one adjudi-

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to whether or not he [the plaintiff, Miller] is entitled to a three-judge court because of the case of Kesler v. Department of Public Safety, 369 U.S. 153."

[6] Before that tribunal can determine this jurisdictional fact it must be constituted by the chief judge; it must hold

cable by a three-judge court ordinarily an appeal will not lie to the Supreme Court, 28 U.S.C. Section 2101 (b), and the error of the three-judge tribunal in wrongfully assuming jurisdiction and adjudicating the case would have to be corrected by the appropriate court of appeals. [7]

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a hearing and render its decision. It must do so even if it is utterly apparent that no substantial constitutional question as to the statute under consideration is presented under the ruling of Ex Parte Poresky, 290 U.S. 30, 32 (1933). On the other hand, there are cases in which it is difficult to determine whether the adjudication should be made by a three-judge court or a single-judge court. See Johns v. Allen, 231 F. Supp. 852 (D.C. Del., 1964). Sound judicial husbandry would seem to indicate a differentiation in the treatment of the two kinds of cases just referred to. What has been said does not, of course, go to the issue of the nature of the power of the chief judge.

[7] It should be noted that where a three-judge court has been convened to review the constitutionality of a statute, where a court so constituted was not required under certain circumstances, the Supreme Court may see fit to treat the jurisdictional statement filed in support of the plaintiff-appellant's appeal to the Supreme Court as a petition for certiorari prior to the judgment of the court of appeals under 28 U.S.C. Sections 1254(1) and 2101(e), grant the petition and remand the case to the district court to enter a decree granting appropriate relief to the plaintiff-appellant. See Turner v. City of Memphis, 369 U.S. 350 (1962). Compare Bailey v. Patterson, 369 U.S. 31 (1962). It should be noted, however, that in Turner v. City of Memphis, supra, the case had not proceeded to trial; that in Bailey v. Patterson, supra a three-judge court was not required though one had been convened. In Bailey v. Patterson the Supreme Court remanded the case to the end that the plain-

It is clear that when a United States district judge has failed to effect the notification or to make the request required by Section 2284(1), the Supreme Court will grant mandamus. See Stratton v. St. Louis S. W. Railway Co., 282 U.S. 10, 16 (1930). But is there a remedy other than an appeal to the Supreme Court to aid the injured litigant in the case where a district judge has given notification to the chief judge of the circuit of the filing of a case which on the pleading requires adjudication by a three-judge court and the chief judge erroneously fails or refuses to act upon the notification by constituting such a court? I conclude that the remedy of mandamus is available and that the Supreme Court would issue such a writ to a chief judge who failed to act. [8]

But this brings us back to the underlying problem. Is the act of the chief judge of the circuit in designating two other judges to sit with the district judge to whom the application for a three-judge court was made a purely ministerial one as suggested in the preceding paragraph but one, or does the chief judge have the power and the duty, as does the district judge to whom the application was made, to determine whether or not the case upon which the district judge's notification is founded is a three-judge case in reality? The question may be stated in another way as follows. Is there the instant requirement of a three-judge court as soon as the certification is made

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tiffs-appellants' claims should be adjudicated by a single-judge district court.

[8] I have been unable to find any case in point.

by the district judge, however erroneously, to the chief judge of the circuit or does the chief judge of the circuit exercise a separate judicial function to determine, before constituting the three-judge court, whether the case is one adjudicable by a three-judge tribunal or whether it is one adjudicable by a single-judge district court? Such a court would, of course, when constituted, have authority to decide whether or not it had the power to determine its jurisdiction to decide the case: i.e., to determine whether or not the case is adjudicable by a three-judge court.

Some light is thrown on this fundamental issue by the development of the statute providing for three-judge courts. The original statute, the Act of March 4, 1911, 36 Stat. 1150, 1162-63,[9] put the power to

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[9] Section 266 of the Act of March 4, 1911, 36 Stat. 1162, provides: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to

create a three-judge court in the hands of the district judge to whom the application was made, as well as in the hands of a Circuit Justice or a circuit judge, depending on how the application was made. If the application was made to the district judge, he had the power to call to his assistance two other judges, one of whom could be the Circuit Justice, who might indeed have been the Chief Justice of the United States, a procedure which was eliminated in the 1948 revision of the Judicial Code.

The second relevant statute, the Act of October 22, 1913, 38 Stat. 219, 220, provided that no *interlocutory* injunction to suspend or restrain the enforcement of an order of the Interstate Commerce Commission should issue unless the application for the injunction was presented to a circuit or district judge and was heard and determined by three judges, of whom one at least was a circuit judge, and unless a majority of the three judges should concur in granting the application. The statute further provided that when such an application was presented to a circuit or district judge he should call to his assistance to hear and determine the application two other judges. As has been stated, the statute provided that one of the judges called would have to be a circuit judge, but the designation of the judges to sit with the judge to whom the application was made was left

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a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. . . ."

to the district judge if the application for a three-judge court was made to him.

But the third pertinent statute made a distinct change in the procedure of summoning a three-judge court where an injunction, either permanent or interlocutory, was sought to enjoin the enforcement or operation of an Act of Congress but it did not trench upon the procedure specified by the Act of March 4, 1911, 36 Stat. 1150, 1162-63, in respect to state statutes. I refer to the Act of August 24, 1937, 50 Stat. 751, 752, which provided, among other things, for a direct appeal to the Supreme Court of the United States from a United States district court where the constitutionality of an act of Congress was brought into question. Section 3 of the 1937 Act provided: "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such

application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately, two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination." It will be noted that for the first time in this Act the senior circuit judge, now the chief judge of the circuit, is brought into the procedure and plays a decisive part.

The amendments effected by the Act of April 6, 1942, 56 Stat. 198-9, are not pertinent and for that reason they are not set out or discussed here.

The final pertinent changes to the procedure for selecting three-judge courts were effected by Section 2284 of Title 28 of the United States Code which as presently constituted was enacted in 1948 as a complete revision of the prior statutes on the subject. The provisions of Section 2284 are, of course, substantive law but there are no substantial differences between the provisions of Section 2284 as it presently exists and those of Section 3 of the Act of August 24, 1937, 50 Stat. 752. The relevant portions of Section 2284 are as follows: "*Three-judge district court; composition; procedure.* In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of

the application, he shall immediately notify the chief judge of the circuit who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding." [10]

The second paragraph quoted, under "(1)", supra, must be read in the light of and must be deemed to be modified and governed by the first paragraph quoted. On the filing of the application to the district judge, when a proceeding has been filed which requires a three-judge court for its adjudication, the district judge must notify the chief judge of the circuit that there is a case which has the legal status specified by the statute. The district judge performs an act of judicial judgment and concludes as a matter of law that the pending case is one requiring three judges for its adjudication. He then notifies the chief judge of his decision and requests the chief judge to designate the two other judges who shall sit with him. The second paragraph quoted, "(1)", supra, provides that the district judge "shall" do these things when the proceeding requires it. It can be said with certainty that the district judge's functions in this regard are judicial rather than ministerial. See Bailey v. Patterson, 369 U.S. 31 and Turner v. City of Memphis, id., at 353-54 (1962).

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[10] It will be observed that Section 2284, Title 28, U.S.C. has drawn the provisions for designating three-judge courts for determining the validity of Acts of Congress and State Statutes and orders of the Interstate Commerce Commission into a single statute providing uniformity of designation and procedure.

A narrow reading of the second paragraph of Section 2284 "(1)" as quoted would require that the district judge "on the filing of the application" "shall" "immediately notify the chief judge of the circuit." This would reduce the course to be followed by the district judge to mere ministerial action. But it has been demonstrated in the preceding paragraph that his notifying the chief judge requires the exercise of a judicial act on his part. He performs that act in the light of the first paragraph quoted. A narrow reading of the second paragraph, "(1)", would require the chief judge forthwith and in all events to designate two other judges. Again the word employed by Congress is "shall": i.e. the chief judge, on receiving the request of the district judge for a three-judge court, the notification, "shall designate two other judges." But this is too narrow a reading. The chief judge must perform his functions in the light of the first paragraph of Section 2284 quoted above: i.e., he must, as a judicial act determine that the proceeding or case in which the three-judge court is sought to be invoked, is actually one requiring adjudication by a three-judge tribunal. There, therefore, must be two judicial acts performed before a three-judge court may be constituted: the first by the district judge; the second by the chief judge of the circuit. [11] The constituting of a three-judge court re-

[11] No pertinent legislative history has been found which throws any light on the difficult questions of statutory construction presented. It can be argued with some force that the senior circuit judge of the circuit (now the chief judge of the circuit) was brought into the procedure by the Act

quires two separate acts of judicial judgment as indicated, neither merely ministerial. This conclusion, if it be correct, should effect a saving in the time and energy of litigants, of counsel and of judges.

I conclude for the reasons heretofore stated that this is not a case which requires a three-judge court to adjudicate it. I therefore decline to designate two judges to sit with the judge to whom the application for a three-judge court was made. If I am in error, the remedy, I think, should be by way of a writ of mandamus directed by the Supreme Court to me as the chief judge of the circuit. If the district judge to whom the application was made should agree with the view expressed in this opinion I can perceive no reason why he cannot now rescind the request he made to me for a three-judge tribunal, Eastern States Petroleum Corporation v. Rogers, 265 F. 2d 593, 597 (Prettyman, Ch. J., D.C. Cir., mandamus denied, 361 U.S. 805 (1959)), and, having done so, proceed to dispose of the case precisely as he would have done had he determined in the first instance that the case at bar was not one requiring the interposition of a three-judge tribunal.

An alternative course for me to pursue in order to avoid a possible mandamus would be for me to designate forthwith two judges to sit with the district

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of August 24, 1937, because he would have immediately at hand information as to which circuit judge or judges of his circuit would be available for three-judge court duty. The argument is not persuasive in the light of the terms of the statute.

judge to whom the application for a three-judge tribunal was made in this case. If it appeared to the district court as thus constituted that the cause was one not cognizable by a three-judge tribunal, the court could then dissolve itself as a three-judge district court and remit the case to the single judge to whom the application was made for his sole disposition. That this practice is permissible is, I think, well established. See Two Guys From Harrison-Allentown, Inc. v. McGinley, 266 F. 2d 427, 432-3 (3 Cir. 1959). But if the appeal was to the Court of Appeals of this Circuit and the case is in reality one which is cognizable only by a three-judge tribunal, the Court of Appeals could decide only the very limited issue as to whether or not it had jurisdiction to entertain and adjudicate the appeal and could only vacate an improvident order of the single district judge tribunal as was done in the Two Guys case, supra. Such a course would hardly prove helpful here. If the case now pending in the district court is in fact a three-judge case and the district judge had refused to request me, as chief judge of the circuit, to designate two additional judges to constitute a three-judge tribunal, relief to the suitor would be by way of mandamus directed to the district judge from the Supreme Court of the United States as previously noted herein. The waste of the time and energy of litigants, of counsel and of judges will occur in those cases where no appeal is taken until after the case is tried and where constitutional issues involving federal or state statutes are at issue. The waste of time and energy may be very considerable for the trial court may reach

a final judgment only to discover later that it was without jurisdiction to determine the case. The case at bar, of course, has not been tried.

On consideration of all of the factors and being of the opinion that the chief judge of the circuit has the duty to determine judicially whether the case is one which is adjudicable by a three-judge tribunal, as had the district judge to whom the application is made, I conclude, with all respect and esteem for the District Judge who made the request of me, that the action is not one cognizable by a three-judge tribunal, and further that the ends of justice would be best served by my declining to designate two additional judges to constitute a three-judge tribunal in this case. See Kirk v. Board of Education, F. Supp. (D.C. E.D. Pa. 1964). Consequently, an order to that effect will be filed in the district court concurrently with this opinion.

(s) John Biggs, Jr.
Chief Judge
Third Circuit

December 31, 1964.

ORDER OF THE SUPREME COURT

Office of the Clerk

SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

October 11, 1965

Re: (Charles F.) Miller v. Biggs, Chief Judge, etc., No. 19 Misc., October Term, 1965

Dear Sir:

The Court today entered the following order in the above-entitled case:

"The motion for leave to file a petition for a writ of mandamus is denied."

Very truly yours,
John F. Davis, *Clerk*
by G. T. Lyden
Assistant

Reported in 382 U.S. 805, 86 S. Ct. 92 (1965).

STATUTES

28 U.S.C. §1291. *Final decisions of district courts*

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. §1334. *Bankruptcy matters and proceedings*

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

75 P.S. §1413. *Suspension for nonpayment of judgments; exceptions*

"(a) The secretary, upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration of any resident operator or owner . . . against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 1416.

"(b) If the judgment creditor consents in writing, in such form as the secretary may prescribe, that the judgment debtor be allowed li-

cense and registration . . ., the same may be allowed by the secretary, in his discretion, for six (6) months from the date of such consent, and thereafter until such consent is revoked in writing notwithstanding default in the payment of such judgment or of any instalments thereof prescribed in section 1416, provided the judgment debtor furnishes proof of financial responsibility.

"(c) Any person whose license, registration . . . has been suspended, . . . may be relieved from the effect of such judgment as hereinbefore prescribed in this article, if such person can present to or file with the secretary proper evidence that a bond or insurance policy as provided for in this article was in force and effect at the time of the accident resulting in the judgment, and is or should be available for the satisfaction of the judgment to the extent provided for in this article; . . ."

75 P.S. §1416. *Instalment payment of judgment; default*

"(a) A judgment debtor, upon due notice to the judgment creditor, may apply to the court in which such judgment was rendered for the privilege of paying such judgment in instalments, and the court in its discretion and without prejudice to any other legal remedies which the judgment creditor may have, may so order and fix the amounts and times of payment of the instalments.

"(b) The secretary shall not suspend a license, registration or a nonresident's operating privilege and shall restore any license, registration or nonresident's operating privilege suspended following nonpayment of a judgment, when the judgment debtor gives proof of financial responsibility and obtains such an order permitting the payment of such judgment in instalments and while the payment of any instalment is not in default.

"(c) In the event the judgment debtor fails to pay any instalment as specified by such order, then, upon notice of such default, the secretary shall forthwith suspend the license, registration or nonresident's operating privilege of the judgment debtor until such judgment is satisfied as provided in this article."